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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-636

WILLIAM HOWARD CROSS, SR.,
Petitioner,

versus

PAT JARVIS, SHERIFF,
Respondent.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

1. PROCEDURAL POSTURE.

Respondent, William Howard Cross, Sr., hereinafter called "Cross", was indicted in DeKalb County, Georgia, charged with the offense of the bribery of DeKalb County Police Detective Robert W. Young. He admitted the money payment and pled entrapment as a defense. Trial was held on the issue April 15-19, 1974, before Judge Thomas Allen and a jury. Cross was found guilty by the jury and sentenced to 5 years. (Trial Transcript T-1190). Cross appealed from this conviction to the Georgia Court of Appeals, Case Numbers 50772 and 50773; see 136 Ga. App. 400 (1975). This appeal was consolidated with Cross's appeal from the trial court's overruling of his Extraordinary Motion for New Trial. 136 Ga. App. 400 at 401. All issues raised therein were determined adversely to

Cross. The Supreme Court of Georgia denied cert. January 8, 1976, No. 30717. Cross then filed Habeas Corpus petitions with the United States District Court for the Northern District of Georgia alleging that a vital witness, Marshal Blalock (hereinafter Blalock) had been led to flee the jurisdiction of the court through improper actions of the trial Judge, Judge Allen. Relief was denied in the District Court, whose decision was affirmed by the Fifth Circuit, United States Court of Appeals, on September 28, 1978. A petition for rehearing was denied by that court on November 8, 1978.

Cross was then arrested by the DeKalb Sheriff's Office, to begin serving his sentence, whereupon he filed, on November 22, 1978, a Petition for Writ of Habeas Corpus in the Superior Court, for the County of DeKalb, State of Georgia, Case No. 78-6608.

The grounds of the petition were based on alleged "newly discovered" evidence (Cross Petition, Par. 8), specifically, Cross now alleged that Blalock had fled the State prior to Cross's trial due not to the improper actions of Judge Allen but due to actions of a member of the DeKalb County Police Department, one Wendell C. McGlamery (hereinafter McGlamery).

The matter was heard before Judge Hubert C. Morgan, Judge Emeritus of the DeKalb Superior Court. After the hearing, Judge Morgan granted Cross's Writ, and granted Cross bond in the amount of $5,000. (Habeas R. 53). The State then appealed to the Supreme Court of Georgia, which on June 20, 1979, reversed Judge Morgan in an unanimous opinion. (Habeas, R. 4). Cross's Motion for Rehearing was denied on July 18, 1979.

Cross then petitioned the Georgia Supreme Court with a Motion to Stay the Remittitur, which if granted would prevent Cross's rearrest. This motion was denied and the remittitur was transmitted to DeKalb County.

Before the State could execute an arrest warrant on Cross, his attorney secured a stay from Judge Morgan, the same judge who had issued the above Writ of Habeas Corpus. The order which Cross's attorney admits was signed by Judge Morgan while in the State of Texas, stayed DeKalb authorities from arresting Cross pending decision by the U. S. Supreme Court on the Writ of Certiorari or until further order of the court. (Habeas, R. 15).

The State has appealed this stay and that matter is now before the Supreme Court of Georgia, being Case Number 35579. (Habeas R. 1.)

2. THE FACTS AT TRIAL.

The factors leading up to Cross's arrest and trial are these. A short time prior to the occurrence of the bribe for which he was on trial, Cross gave four fifty dollar bills to his co-defendant, Harold Johnson, and told Johnson to give them to Sgt. Wendell McGlamery of the DeKalb County Police Department as a belated Christmas present. McGlamery told Johnson to tell Cross to take the money back and "cram it". (T. 933 and T. 220). On January 26, 1972, a telephone conversation occurred between Johnson (not the alleged entrapper Blalock) and Detective Young, and a meeting was set up at a designated location. (T. 222). This conversation between Young and Johnson was intercepted and taped. (T. 221). Detective Young, equipped with a microphone and radio transmitter, went to the meeting place where he was introduced

to Cross by Johnson, (Blalock was not present), (T. 225-227), and after some discussion, the following took place, according to Detective Young, quoting Cross: " 'how about let's making a deal, I'll give you $200.00 now, $200.00 on the 25th of each month, and if you give me information concerning a known figure, I'll give you a bonus, or a piece of pie from him, and I'll handle that.' (T. 464). He (Cross) then took $200.00 . . . two one hundred dollar bills, out of his right pants pocket and handed them to me." (T. 464). This conversation was also taped by two other police officers a short distance from the scene and the tape preserved. (T. 468). These tapes were involved in a Motion to Suppress, which was denied. See *Cross v. State,* 128 Ga. App. 837. There was nothing in the taped conversations indicating any entrapment. See language of the Court of Appeals decision, *Cross v. State,* 136 Ga. App. 400, et seq. The claims of entrapment were based upon testimony allegedly showing that Officers Young and McGlamery were, through Johnson and Marshal Blalock, importuning and inviting Cross to pay the money for protection and information as to raids. At the trial, both Cross and Johnson, his codefendant, (tried separately) testified extensively on the entrapment theory. (T. 901-1035).

3. THE HABEAS CORPUS FACTS.

The present stage of the litigation arises out of alleged State conduct as to the nonappearance at trial of a defense witness Blalock. Blalock was allegedly subpoened in November, 1973 for the first setting of the Cross trial. The trial was not held that November, but was held the following April. (T. 2). When the case was called for trial in April, 1974, it developed that Blalock had voluntarily

left the Court's jurisdiction, apparently for Jacksonville, Florida. (T. 2). The defense specifically did not ask for a continuance based on this nonappearance of Blalock. (T. 1 and 2). The newly discovered evidence upon which Cross based his State Habeas Corpus Petition was that Detective McGlamery allegedly caused Blalock to avoid Cross's subpoena process and to leave the jurisdiction of the State prior to the April, 1974 trial. This, Cross alleged, deprived him of due process and of his right to call witnesses in his behalf under the Sixth and Fourteenth Amendments to the United States Constitution and under the Constitution of the State of Georgia. McGlamery denied this conduct. H.C.T. II, 45, 47 and 48.

a. JUDGE HENDON'S TESTIMONY.

From the testimony elicited before Judge Hubert Morgan on this Habeas Corpus petition, it is very clear that Blalock was an unwilling witness. Cross's trial counsel, now Judge E. T. Hendon of the DeKalb County Superior Court, stated on H.C.T. I, 25-26, that Blalock had told him directly that he would not appear in response to a subpoena. Judge (then attorney) Hendon asked the trial Judge (Tom Allen) for an arrest order and bond to be executed on Blalock. Subsequent to this, Judge Allen telephoned an acquaintance of Blalock advising them to aid in getting Blalock to appear. This, Cross alleged, resulted in Blalock being tipped off and fleeing. H.C.T. I, 27 and 28. This alleged misconduct and error of the trial judge (Judge Allen) was incorporated in Cross's Extraordinary Motion for New Trial and the earlier Federal Habeas Corpus Petition. Judge Allen was upheld on both State and Federal levels. The testimony of Blalock on the hearing of the State Habeas Corpus petition, however, was to the effect that Officer McGlamery caused him to

flee the State earlier than he had orginally intended by informing him he was being sought and would be compelled to appear as a witness at the April, 1974 trial. H.C.T. II, 14-15. Cross's attorney (now Judge E. T. Hendon) stated, however, H.C.T. I, 29, that,

> "There were several other matters that came to my attention during and after the trial that I thought were extremely important. But, specifically as it related to Blalock, there was prosecutorial misconduct to begin with on behalf of the State's witnesses, McGlamery and Young, in participating and causing this witness to abscond and be unavailable for trial." H.C.T. I, 29.

Judge, (then attorney) Hendon again states, H.C.T. I, 33: "Now at that point (referring to the first day of the April, 1974 trial) I had learned that your witnesses, Mr. McGlamery and Mr. Young, apparently had gotten to him and he had fled and I had not been able to serve him with this arrest order." This conduct, although known to Cross as shown above, had not, however, been argued earlier along with Judge Allen's alleged misconduct in phoning Blalock's acquaintance either on State or Federal level. See *Cross v. State*, 136 App. 400, and *Cross v. Georgia*, 581 F.2d 102 (1978).

Again, on H.C.T. I, 36, Judge (then attorney) Hendon states that he actually believed that he *had* made McGlamery's conduct a part of his earlier Federal Habeas Corpus motions and Extraordinary Motion for New Trial, that he had information at that time that the officers had allegedly decoyed Blalock away and had indeed confronted McGlamery with this at the trial on cross examination. H.C.T. I, 37. In fact, there is no mention of these matters in the earlier Extraordinary Motion for New Trial or the Federal Habeas Corpus.

On H.C.T. I, 42, Judge Hendon stated that although he knew of the above actions by the officers, he, in his opinion, had no admissible evidence of this to ask for continuance or to put it in the Extraordinary Motion for a New Trial. He thus made no attempt to perfect the record by asking said continuance. (T. 1 and 2).

Casting further light on this matter is the testimony of Richard Bell, who in 1974 was the District Attorney in DeKalb County. Testifying at the Habeas Corpus hearing before Judge Morgan, Mr. Bell stated that on the morning of the first day of the trial, April, 1974, there was a discussion of the Blalock matter before Judge Allen in chambers. There Mr. Hendon was asked if he had registered his list of witnesses with the Clerk of Court as provided by law for enforceable subpoenas. Mr. Hendon replied that he had not. Regarding the subpoena for Blalock, he (Hendon) replied he had prior (November, 1973) issued one he called a continuing subpoena, but he said he did not want a continuance, that he wanted to go ahead with the trial. Mr. Hendon further stated to Mr. Bell that he (Hendon) had represented Blalock and that, "he could get him there if he wanted him there." H.C.T. II, 56-58.

b. BLALOCK'S TESTIMONY.

Blalock's testimony regarding his leaving Georgia for Florida was that:

> "He (McGlamery) came by one day and told me that if I was going to go to Florida, I better get on out from here; that Judge Allen was issuing a warrant for me to put me under bond so I'd have to stay here and go to court . . . . (H)e said E. T. (Hendon) was going to serve it on me . . . that Sheriff Bonner had two deputies assigned to find me." H.C.T. II, 15.

Blalock states that he then went to Covington, stayed with his brother and at a hotel for two or three days, then got a U-Haul trailer, packed his family, and left for Florida. H.C.T. II, 15-16.

On cross examination by Assistant District Attorney Al Hartley, Blalock was confronted with evidence introduced into the record, being a certified copy of his conviction in Federal District Court of the Northern District of Georgia on a crime involving moral turpitude. H.C.T. II, 17. Blalock pled guilty to four counts, including devising a mail fraud scheme, using ficticious names in the same, making false statements to an agency of the U. S. Government, in Criminal Information CR 76-213A. Further cross examination of Blalock revealed that Blalock had intended to move to Florida before he had ever known the trial was coming up. H.C.T. II, 19. Blalock had previously arranged for a job in Florida. H.C.T. II, 20. Blalock further admitted that when Judge (then attorney) Hendon wanted him to be a witness, he had told him that he didn't want to get involved and further may have told him that what he would say would not help. In fact, at the Habeas hearing Blalock stated he may have said anything to Judge Hendon. This exchange was followed by a question from Assistant District Attorney Mr. Hartley: "Is it possible you could say anything now?" A. "Well, I guess it is." H.C.T. II, 21.

On redirect examination, Blalock stated that although he had previously planned to move to Florida, that he had accelerated his plans by a week or two after talking with McGlamery. H.C.T. II, 22. Again this entire meeting and conversation was denied by Sgt. McGlamery. H.C.T. II, 45, 47, 48.

Mrs. Blalock and Pamela Blalock also testified that McGlamery had visited their apartment in the time preceding the Florida move. Neither, however, overheard any conversation between McGlamery and Blalock regarding any urging of Blalock to leave the state. H.C.T. II, 27, 28, 31, 32. On cross examination of Mrs. Blalock, the State introduced into evidence a certified copy of her conviction in Federal District Court, Northern District of Georgia, of a crime involving moral turpitude. H.C.T. II, 29. Her offense was similar and connected with Blalock's above described and is CR-76-213A.

Later in the hearing Blalock was recalled for cross examination by the State. He then testified that he had never been subpoened prior to the January 1979 Habeas Corpus hearing. H.C.T. III, p. 3. On redirect, he then stated that he had been offered a subpoena for an earlier setting of the trial in November, 1973, (the trial had then been continued), but had refused it as the server wasn't an officer. Blalock had then been handed a piece of paper, which he didn't look at, and was told by the server it was a subpoena. H.C.T. III, 4. Again all this occurred in November of 1973.

Blalock states that his reason for coming forward now is not fear of Cross, (H.C.T. II, 6), but states that although he doesn't remember, he is not certain that he didn't tell Officer Young, in a telephone conversation, that he didn't want to wind up like Cross's codefendant, Harold Johnson, (dead). H.C.T. II, 6. This expression of Blalock's fear of Cross was confirmed by Officer Young, (H.C.T. II, 62 and 63) and Sgt. McGlamery, H.C.T. II, 47.

c. McGLAMERY'S TESTIMONY.

In cross examination of Sgt. McGlamery, the police

officer stated that he did not tell Blalock about the court process or arrest that Judge (then attorney) E. T. Hendon had procured from Judge Allen to insure Blalock's attendance. H.C.T. II, 43. This was elaborated on in the following direct testimony. H.C.T. II, 45, 46, 47. There McGlamery states that Blalock had phoned him about testifying and had said that Judge Hendon had talked to him and asked McGlamery's opinion. McGlamery told him, in effect, to use his own judgment. See H.C.T. II, 46 and 47. This conversation occurred in late 1973 regarding the November, 1973 trial, not the April, 1974, period when Blalock moved! H.C.T. II, 49. Further, McGlamery said that Blalock had not mentioned to McGlamery that he was under subpoena in November, 1973, if indeed he was under subpoena at the time of the said phone call. H.C.T. II, 50.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The State urges that this Court should not issue a Writ of Certiorari to the Supreme Court of Georgia. In urging rejection of Cross's Writ, the State basically will go no further than arguments relying on the facts of the case and using as authority the cases Cross has cited in his Petition to this Court.

The contention that the Georgia Supreme Court has emasculated the doctrine of *Johnson v. Zerbst*, 304 U.S. 458 is unsupported when a comparison of the facts of the two cases is made. In *Zerbst*, the defendant, an alleged counterfeiter, was also a military enlistee far from home, with little education, no friends or family in the forum jurisdiction and no money. Under the then existing forum law, he was not allowed an attorney and was tried and

convicted without an attorney's assistance. This Court properly found that the average layman did not have skills necessary to act as his own attorney. The denial of attorney was thus so fundamental as to jeopardize all other protections of the Constitution. However, in *Zerbst* this Court went on to state that the question of waiver must be considered upon the facts and circumstances of each case. *Zerbst* at 464. Here, Cross has had the benefit of skilled counsel at each of the many stages of these proceedings. Inherent in *Zerbst* is the assumption that under proper circumstances a constitutional right may be waived. Here, Blalock was allegedly subpoened for a trial in November, 1973. The trial did not occur until April, 1974. (T. 1-2). Blalock was never resubpoened and the defense subpoena list was never filed with the Clerk. H.C.T. II, 56-58. Cross had counsel before, during, and after that trial. Counsel knew at trial that Blalock had left and believed that McGlamery and Young had caused this action. H.C.T. I, 33. However, counsel did not ask a continuance or attempt any showing thereof on the record to preserve any error. (T. 1-2). In fact, he told the (then) district attorney that he did not want a continuance and that ". . . he could get him (Blalock) there if he wanted him there." H.C.T. II, 58.

Further Cross's counsel believed that he had made the alleged police conduct with regard to Blalock an issue in the earlier Federal Habeas Corpus. H.C.T. I, 36. He certainly knew of the allegations, H.C.T. I, 37, by his own admission, but no such allegations are to be found in the Federal Habeas Corpus. The State feels that, based on the above, it would be difficult to find a case wherein the circumstances of the waiver of a constitutional right are more unlike *Zerbst*.

Although the right to offer witnesses' testimony and

to compel attendance is a right affecting the fairness and accuracy of the fact finding process, it is unfair to equate the present situation with that of *Washington v. Texas*, 388 U.S. 14. There, by virture of a state law, a common law holdover, codefendants were incompetent to testify in each other's behalf by operation of the said State law. The defendant, charged with murder, was sentenced to death because a codefendant was not allowed to testify that he, not Washington, had shot the victim, while Washington tried to prevent the shooting. This Court properly found that the codefendant's testimony was relevant and material and even vital to Washington. *Washington* at 16.

Unlike *Washington*, we deal here with voluntary waiver, not denial of the use of witnesses by operation of state law. Here Blalock's testimony at most would be merely cumulative of testimony already presented at trial both by Cross and Johnson as to the alleged entrapment.(T. 901-1035). Johnson was not tried together with Cross and was therefore not before the jury as a codefendant at that time.

Cross's citation of *Barker v. Wingo*, 407 U.S. 525, is puzzling as that case dealt with a demand for speedy trial not here at issue. However, with regard to the proposition that the State must show "intentional relinquishment or abandonment of a known right or privilege", when a substantial constitutional right affecting the fairness and accuracy of the fact finding process is involved, the State contends that such showing has been made. Cross's counsel twice has stated that he did not want a continuance, (T. 1, 2) and H.C.T. II, 56-58. He further stated that if he had wanted Blalock he could get him. H.C.T. II, 58. This, the State urges, is clearly a voluntary,

knowing waiver.

Cross urges that the Supreme Court of Georgia acted in a manner not in keeping with its previous decisions in habeas corpus appeals, quoting *Allen v. Caldwell*, 231 Ga. 442, 443, to the effect that the court would affirm the habeas court if there were "any evidence" to support its finding of facts. The *Allen* case involved a ruling against the habeas petitioner. The theory behind the referenced *Allen* quote may be found in the earlier case on the point, *Johnson v. Smith*, 225 Ga. 519 (1969). Therein, the Georgia Supreme Court in affirming the habeas court's denial of habeas, stated, "In dealing with these contentions, it should be kept in mind that a presumption exists in favor of the validity of sentences . . . ." In other words, after a guilty plea or jury verdict, the presumption is with the validity of said judge or jurors finding of fact at trial level. This is the meaning of the line of cases of which *Allen* is a part.

Cross states that Blalock's testimony is corroborated by four other witnesses. (See Cross Petition 22). While this may be technically correct, a perusal of the testimony of the habeas hearing shows that the testimony of the so-called corroborating witnesses merely relates what Blalock told them as to why he left the State rather than appear at Cross's trial. There is no evidence independent of Blalock's revelations that he was told to leave by Sgt. McGlamery. The so-called corroboration shows only that Blalock repeated this story to four persons. The mere fact that a story is often told does not render it factual. If the case was otherwise, many colorful American legends—Paul Bunyan, for example, would be history. In the last analysis, the only source of the Sgt. McGlamery story is Blalock. This is the same Blalock who is a convicted

felon, and who comes forward with this story five years after Cross's conviction, a "deus ex machina", at the very moment that Cross's appeals run and he begins serving his sentence.

Cross urges that his conviction must fall under the authority of *Alcorta v. Texas*, 355 U.S. 28, and *Hampton v. United States*, 425 U.S. 484, on the basis that Blalock's testimony minimally corroborates Cross's trial testimony and shows absence of "predisposition" on Cross's part to bribe police officer Young. A reading of *Alcorta* shows that the case did not turn on minimal corroboration. Alcorta was charged with killing his wife. He urged that he caught her in another man's arms and killed in heat of passion. The alleged lover denied any relationship with the deceased. Alcorta was convicted of first degree murder and sentenced to death. The "lover" later changed his story, saying that the deceased was not only his lover but was in his arms on the night of her death, and that the state prosecutor had known this at the time of trial. This Court quite properly held that if the lover had testified truthfully at trial, it would vitally corroborate Alcorta's passion defense. Thus *Alcorta* turns on material—vital—corroborative testimony, not minimal corroboration of testimony of Cross and another witness, Johnson, at trial to similar effect on alleged entrapment.

Cross's reliance on *Hampton* is similarly misplaced. There, no entrapment was found in much stronger circumstances than the case at bar. Hampton was convicted of sale of heroin to police agents. A pool-playing acquaintance—Hutton—a DEA informer, set up the sale, directed Hampton to the sale location and accompanied him while Hampton sold. This occurred twice. Hampton contended that Hutton had provided the drugs, telling

Hampton that they were fake drugs and it was a joke. Hutton evidently was not at the trial. The jury did not believe Hampton's story, convicting him. The key, this Court stated in opinion, was not conduct of the government agent but the predisposition of Hampton to commit the crime.

Here although Cross urged at trial that Blalock and Johnson (Johnson testified at trial) urged him to meet with McGlamery and Young to work something out, the trial testimony is clear that Blalock did not even accompany Cross, when he and Johnson picked up Young in their Cadillac and drove to the middle of an empty shopping center parking lot at night to talk. (T. 462, et seq.). Blalock was not present when Johnson (who did testify) introduced Cross to Young and sat with them in the Cadillac while the incriminating conversation ensued. (T. 462, et seq.). When Cross broached the subject of money to Young as shown on the tape recordings, Blalock was conspiciously absent. There is no way that the absent Blalock's testimony can show a lack of predisposition on Cross's part, when Johnson's testimony before the jury was unable to do so, and Johnson was present and speaking at the scene.

There is, therefore, even if the first *Agurs v. United States*, 427 U.S. 97 standard was properly applied, no reasonable likelihood that the trial verdict would have been different. The state officer has denied sending Blalock out of state. (H.C.T. II, 44-48). Blalock maintains that he was sent. This, the State urges, is clearly insufficient to create a presumption that it was the State's case which contained the perjured testimony as in *Mooney v. Holohan*, 294 U.S. 103.

In *Agurs*, the defendant urged error in that the prosecutor failed to disclose the victim's record of violence which she contends would have aided her self defense arguments. This Court found firstly that she (her attorney) had not asked for the record. Here, Cross's attorney asked for no continuance to locate and compel Blalock's attendance. In fact, he stated on the record (T. 1-2) that he was not asking a continuance. The record did not rise to an inference of perjury. Finally the court remained convinced of guilt when considering the whole record. In *Agurs* this Court stated, "Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant than the harmless error rule . . . . This means that the omission must be evaluated in the context of the entire record . . . . If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *Agurs*, 112-113.

It is interesting that the evidence in *Agurs* was largely cumulative of the evidence presented to the jury by the victim Sewell's wearing of a bowie knife and another knife when he was killed. Here, Blalock's evidence on alleged entrapment would be merely cumulative of Cross and Johnson's trial testimony on the same issue. Therefore, even were the first *Agurs* standard applied, and the State contends that on these facts it would not be properly applied, that there is no reasonable likelihood that the verdict would have been different had Blalock made himself available then rather than five years later.

CONCLUSION

The State therefore respectfully requests that this Court deny petitioner Cross's petition for Writ of Certiorari, leaving undisturbed the decision of the Supreme Court of Georgia overruling the Writ of Habeas Corpus issued by the DeKalb County Superior Court, State of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, _____, hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Response to the Petition for Writ of Certiorati in the above-styled case on Counsel for Petitioner by depositing same in the United States mail, first class postage prepaid, addressed as follows:

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All parties required to be served have been served this ____ day of November, 1979.

C. DAVID WOOD
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